BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHIRLEY HULL	)	
Claimant	)	
VS.	)	
	)	Docket No. 129,511 & 129,512
STATE OF KANSAS	)	
Respondent	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant, respondent and the Kansas Workers Compensation Fund appeal the review and modification Award of Administrative Law Judge Floyd V. Palmer dated October 24, 1997. Oral argument was heard before the Appeals Board on May 13, 1998.

APPEARANCES

Claimant appeared by and through her attorney, John J. Bryan of Topeka, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, Scott M. Gates of Topeka, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Derek J. Shafer of Topeka, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

Claimant raises the following issues for Appeals Board determination:

"(1) All issues determined adversely to claimant.

"(2) Whether TTD paid on first accident may be deducted from permanent total disability benefits paid on the second accident."

Respondent and the Kansas Workers Compensation Fund raise the following issues for Appeals Board consideration:

"(1) The Honorable Judge Palmer erred in modifying the previous Award.

"(2) The Honorable Judge Palmer erred in finding claimant to be permanently and totally disabled.

"(3) The Honorable Palmer erred in failing to apply the requirements of K.S.A. 4[4]-528.

"(4) The Honorable Palmer erred in finding the testimony of Dr. Murray and claimant to be uncontroverted, when the testimony of both is replete with contradiction, if not misrepresentation.

"(5) The evidence presented is such that claimant has failed to meet her recognized burden as to the requirements for modification of an Award pursuant to K.S.A. 44-528."

The Workers Compensation Fund also raised the following issue at oral argument for consideration:

Was the review and modification filed in a timely fashion?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the evidentiary record filed herein, the Appeal Board makes the following findings of fact and conclusions of law:

Claimant suffered accidental injury arising out of and in the course of her employment with the respondent on July 14, 1986, in Docket No. 129,511, and July 13, 1987, in Docket No. 129,512. The parties settled these cases on July 2, 1990, on the basis of an agreed running award based upon a 75 percent permanent partial disability to

the body as a whole. The July 1986 and July 1987 accidents were treated as one, resulting in the single award with a date of accident of July 13, 1987.

As part of the agreed award, the parties acknowledged that no application for review and modification would be filed with respect to claimant's disability before January 1, 1995. In keeping with that agreement, claimant filed for review and modification on October 4, 1995. The resulting award is the basis for this appeal.

Claimant alleges her condition has substantially worsened since the implementation of the running award. Her neck and back hurt constantly with claimant suffering headaches on a weekly basis. Claimant uses both a wheelchair and a cane on a regular basis and occasionally wears a neck collar, especially when driving. Claimant has been a regular patient of her chiropractor, Dr. Patrick E. Murray, and was granted eighteen visits per year with Dr. Murray as part of the original 1990 running award. Claimant testified that she needs more treatments than the original award granted except she cannot afford to pay for the treatments. Claimant's pain is worse now with almost constant pain in the right side of her neck, shoulder, arm and hand, into the low back area and down into her leg and foot. Claimant acknowledges that, while these are the same symptoms she described in 1990 at the regular hearing, they are now more severe. Claimant testified that in 1990 she had hoped to eventually return to work, but has recently resigned herself to the fact that she will never be able to return to work. She describes her condition as being much worse than it was in 1990. There is no kind of job that claimant believes she can presently perform.

Claimant has been receiving chiropractic care from Dr. Patrick E. Murray since 1981 or 1982. After the injury in July 1986, he saw claimant eighty-two times over a 13-month period. His treatment of claimant after the 1986 and 1987 accidents has been ongoing with peak periods in 1986 and 1987, and fewer visits recorded in 1989 and 1990. His records show an increase in the numbers of treatments required after 1991.

Claimant has been diagnosed with cervical nerve at C1 through C4, whiplash syndrome, neuritis due to disc displacement, compression of the lumbosacral plexus, damage to the nerves in the low back with radiculitis and lumbosacral strain and sprain. Dr. Murray believes claimant probably reached maximum medical improvement in either 1992 or 1993, and feels that during 1994 and 1995 claimant has gotten worse. He believes claimant's low back condition is very unstable and, as she gets older and arthritis sets in, her condition will accelerate and deteriorate. He has treated claimant more often recently because she is in more pain and needs more frequent treatments. She is prohibited from standing or walking for prolonged periods, and cannot lift anything heavy, hold any weights or do any twisting. Claimant is barely capable of tying her shoes. At his deposition in 1995, Dr. Murray opined that claimant was not capable of returning to any type of employment. He believed that claimant never fully healed from her original injury

and there could be internal physiological problems associated with her worsening condition. Dr. Murray no longer believes that he can improve her condition. All he can provide is temporary relief of her symptoms.

In workers' compensation litigation, claimant has the burden to establish his or her right to an award of compensation by proving the various conditions upon which his or her right to a recovery depends by a preponderance of the credible evidence. *See* K.S.A. 1987 Supp. 44-501, K.S.A. 1987 Supp. 44-508(g).

K.S.A. 1987 Supp. 44-510c(a) states as follows: "Permanent total disability exists when the employee, on account of injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment."

The term "substantial and gainful employment" is not defined in the Kansas Workers' Compensation Act. However, the Kansas Court of Appeals in Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 872 P.2d 299 (1993), held "[t]he trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent."

The evidence in this case establishes that claimant's condition is such that she is essentially and realistically unemployable and, therefore, is permanently and totally disabled as a result of the injuries suffered on July 14, 1986 and July 13, 1987.

Claimant contends that the Administrative Law Judge should not deduct temporary total disability compensation paid for the first injury from the total award. The Appeals Board acknowledges in certain instances, when cases are consolidated, that temporary total disability compensation may be deducted from multiple accidents when only one award is granted. However, in this instance, the Appeals Board must take its direction from the parties' original agreement. The Agreed Award entered into on July 2, 1990, listed temporary total disability compensation paid in the amount of $4,365.27 as a result of the July 14, 1986, accident in Docket No. 129,511. The Award further listed temporary total disability compensation in the amount of $11,861.01 representing 77.18 weeks temporary total disability compensation at the rate of $153.67 per week paid as a result of the July 13, 1987, accident in Docket No. 129,512.

When the parties finalized the Agreed Award, the only deduction of temporary total disability compensation listed in the Award was the 77.18 weeks of temporary total disability compensation paid in Docket No. 129,512. There was no deduction from the original Agreed Award for the temporary total disability compensation paid in Docket No. 129,511. The Appeals Board therefore finds, in keeping with the intent of the parties from the original running award, that the temporary total disability compensation

paid for the first date of accident should not be deducted from the permanent total running award in this instance.

The Fund's contention that the review and modification was filed untimely, as it was filed after the award was fully paid, is answered by the Board's decision in Spillman v. General Printing & Paper, Inc., Docket No. 108,916 (Oct. 1995), wherein the Board held the 415-week limit applicable to permanent partial awards is not applicable to permanent total awards. The only limitations to permanent total disability is the dollar limitation. As claimant has not exceeded the statutory maximum for permanent total disability, the review and modification is timely filed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Floyd V. Palmer dated October 24, 1997, finding claimant permanently and totally disabled should be, and is hereby, affirmed, but the Award is modified with regard to the amount of temporary total disability compensation credited to the respondent.

Claimant is awarded 77.18 weeks of temporary total disability compensation at the rate of $153.68 per week in the amount of $11,861.02, followed thereafter by benefits in the amount of $115.25 per week through April 3, 1995, and in the amount of $153.68 per week effective April 4, 1995, for a total award of $125,000.00. Respondent is granted a credit for the overlap from April 4, 1995, through June 26, 1995, wherein permanent partial disability was paid at the rate of $115.25 per week for 12 weeks, with a total credit of $1,383.00.

As of June 24, 1998, claimant is entitled to 77.18 weeks of temporary total disability compensation at the rate of $153.68 per week, totaling $11,861.02, followed by 325.82 weeks of permanent partial disability at the rate of $115.25 totaling $37,550.76, and followed thereafter by 168.29 weeks of permanent total disability compensation at the rate of $153.68 per week or $25,862.81, less $1,383.00 credit totals $24,479.81, for a total due and owing of $73,891.59. Thereafter, the remaining award is to be paid at the rate of $153.68 per week until fully paid or until further order of the Director, making a total award not to exceed $125,000.00.

IT IS SO ORDERED.

Dated this ____ day of August 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the decision of the majority in this matter. The majority has found that claimant's condition has worsened and that she is entitled to a review and modification of the original award under K.S.A. 44-528.

K.S.A. 44-528(a) allows a review and modification upon a finding that:

> . . . the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished . . . .

A modification of the award or a reinstatement of a prior award is then appropriate.

The modification of an award is based upon the existence of new facts indicating a changed condition of the worker's incapacity which renders the former award either excessive or inadequate. Brewington v. Western Union, 163 Kan. 534, 183 P.2d 872 (1947). The statute contemplates a change of condition warranting a review and modification. Honn v. Elliott, 132 Kan. 454, 295 P.2d 719 (1931).

Claimant's entitlement to a review and modification of the 1990 running award hinges entirely upon her testimony and the testimony of Dr. Murray, her chiropractor. A review of the testimonies of both key witnesses uncovers a multitude of inconsistencies which render both testimonies incredible.

Dr. Murray testified at length as to how claimant's present condition has worsened substantially since 1990. He went on to state that claimant needed chiropractic treatment on a more regular basis in order to alleviate her symptoms. However, a review of

Dr. Murray's medical reports tells a different story. His medical reports from 1986 through 1994 showed claimant experienced a 25 percent improvement in her overall neck condition. By 1995, she had an 88 percent improvement. When considering claimant's shoulder complaints from 1987, a 35 percent improvement was recorded, and in 1994 and 1995, an 80 percent improvement was indicated. Claimant's low back condition improved in 1986 and 1987 by 50 percent with an 80-90 percent improvement through 1995.

In 1986, claimant's cervical range of motion was restricted by 10 percent, with the 1994 and 1995 cervical motion restrictions also showing 10 percent. In 1987, claimant had a 15 percent restriction in her lumbar range of motion, with 1994 showing 10 percent, and 1995 showing 10 to 12 percent restriction which indicates claimant's lumbar range of motion had actually improved. The 1987 pain complaints shown by claimant in her low back, mid back, upper back, shoulder and neck were identical to the pain complaints listed in 1995 although her range of motion had shown improvement. Dr. Murray testified that claimant was permanently and totally disabled in 1995 but his 1987 medical reports also show claimant incapable of performing any type of work due to her severe limitations of activity.

This board member finds that Dr. Murray's testimony is incredible and cannot be believed with regard to the worsening of claimant's condition as his testimony is directly contradicted by his own medical records.

Next we must look to the testimony of claimant. She testified that her condition substantially worsened through 1995 and she is physically incapable of performing any type of work at this time. However, the testimony of claimant after 1987 indicates claimant ceased working after August 1987 and has attempted no type of employment since that time. In 1988, claimant used a cane, she was unable to use crutches because of her shoulder. She had ongoing neck and shoulder problems with headaches and arm weakness, and she had no grip in her right hand. Claimant testified at the preliminary hearing of November 7, 1988, that her attempts to return to work had failed. Her treatment through Dr. Murray was described as not being a cure but simply an assistance in alleviating pain.

At her deposition on November 9, 1995, claimant described her then current symptoms and compared them to the symptoms experienced before 1990. Claimant did not recall having any leg pain in 1990, but her testimony at preliminary hearing in 1988 described specific leg pain after the 1986 car accident. Claimant testified in 1995 that she was then permanently and totally unable to perform any work. In 1988, she testified she was physically incapable of returning to work due to her ongoing pain symptoms. When claimant was asked to compare her 1995 symptoms with those of 1990, all she could testify to was that they were more severe in 1995. However, a review of Dr. Murray's medical reports indicates claimant's condition continued to improve. Claimant testified in 1995 that she had had hopes of returning to work in 1990. However, her November 1988

testimony indicates claimant had not worked since August 1987 and she opined she would have returned to work had she been physically capable of doing so but that she was not.

Claimant applied for Social Security disability in 1988 indicating that she was unable to work as a result of her disabilities. Claimant was awarded Social Security benefits beginning April 15, 1991.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the "credible" evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984). In this situation, the testimony of claimant and the testimony of Dr. Murray are conflicting, untrustworthy and self-serving. The contradictory medical reports of Dr. Murray undermine his attempts to show claimant's worsening condition. In addition, claimant's testimony from 1988 and 1990 mirror the complaints expressed by claimant in 1995. Both claimant and Dr. Murray defeat claimant's allegations of a worsened condition.

Claimant argued before the Appeals Board that the medical evidence and claimant's testimony support a finding that the award of 1990 was inadequate. However, the award of 1990 was an agreed upon running award entered into between the parties at arm's length. The claimant was fully represented then by the same attorney she has at this time. The majority opinion has allowed a claimant, who may have been permanently totally disabled in 1990, to negotiate a settlement, which can then be reviewed and modified based upon not only no change of condition but upon medical records which indicate claimant's condition has improved. This Appeals Board member would find, based upon a lack of credible testimony and credible medical evidence, that claimant has failed to prove a change in her condition, and would deny claimant's request for a review and modification of the original award of 1990.

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Scott M. Gates, Topeka, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director